No. 3608

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines, boilers, boats, tackle, apparel, furniture and appurtenances, and THE NATIONAL SURETY COMPANY (a corporation),

Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA (a corporation),

Appellee.

SUPPLEMENTARY BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FARNHAM P. GRIFFITHS,
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Appellee.

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The Memorandum Addition to the Brief for Appellants is chiefly devoted to

The Millinocket, 266 Fed. 392.

The facts of the case are abbreviated in the report. It appears that libelant supplied coal to one Frederick Crotois, a sub-charterer of the "Millinocket"

from the claimant, Harris, Magill & Company, who were themselves the sub-charterers of the vessel. Under the sub-charter Crotois was to pay for all the coal used. Libelant was informed of this fact at the time the coal was ordered and supplied pursuant to a contract between libelant and Crotois. Even a cursory reading of the case brings out this outstanding fact—that the coal was not ordered or supplied upon the order of a person presumed by the statute to have authority to bind the vessel. Under the statute the charterer (and, of course, the sub-charterer) is not armed with such presumptive authority. There is not a line in the case to indicate that anyone named in the statute as presumed to have authority in fact ordered the coal. The libelant's lien, therefore, depended on whether or not the sub-charterer Crotois had authority in fact to pledge the vessel and whether she was pledged. The libelant was in virtually the same position as he would have been prior to the statute of 1910. He had to prove that the supplies were furnished on the credit of the vessel on the order of one duly authorized thereto. Under *The Kate,* 164 U. S. 458 (decided before the Act of 1910) and *The Sylvan Glen,* 241 Fed. 731 (decided since the Act of 1910), both of which cases were cited by the court in *The Millinocket,* the libelant's claim for a lien was futile—the orders having been placed by the charterer who was without presumptive authority.

The contentions set forth in appellant's memorandum (pages 1 and 2) rest on a misconception of the holding of *The Millinocket* case resulting from disregard

of the all essential fact in the case that no order from one presumed to have authority to bind the vessel is involved. The true situation in *The Millinocket* case as compared with the case at bar is as follows:

In *The Millinocket* case: (1) there was no lien presumed in favor of the libelant; and therefore (2) the existence of the lien depended upon proof that the sub-charterer was in fact authorized to pledge the vessel.

In the case at bar: (1) libelant furnished supplies on the master's order; (2) consequently there was a presumptive lien in its favor; (3) to subvert the lien, proof is necessary that the master, under the charter party, had no authority to bind the vessel; (4) no such proof has been or can be made since the charter party did not exclude his power, express inhibition being necessary therefor, under the holding of all three courts in the South Coast (233 Fed. 327; 247 Fed. 84; 251 U. S. 519; see below).

Such considerations as the fact that libelant had on previous occasions supplied the vessel and had been paid by the charterer, that in case of non-payment by the charterer libelant would have the right to cancel the contract (App. Supp. Mem. p. 2) do not change the rules of law applicable to the case.

Appellant also cites *The Millinocket* as authority for holding that libelant in the case at bar has waived its lien. There the court expressly held that there was no lien but suggested by way of dictum, that if there were, it was waived, and cited as authority *The Eastern,*

257 Fed. 874. In *The Eastern* there was no question but that a lien attached by reason of an order given by the ship's engineer who was entrusted wtih the management of the vessel at the port of supply. Libelant was notified immediately after supplies were delivered that the engineer had no authority in fact to pledge the vessel. The libelant billed the charterer for the supplies after it knew that the charterer had no right to pledge the credit of the vessel, and did not present any accounts to the owner of the tug or intimate any intention to hold the vessel until a considerable time later. The wide differences in the facts of *The Eastern* from those in the case at bar are manifest.

THE STIPULATED FACT THAT THE OIL WAS FURNISHED TO THE STEAMER "UPON ORDERS FROM THE MASTER".

With all respect to counsel for appellants, it appears to us that their argument in this connection savors of afterthought and runs toward equivocation and play on words.

Let us be plain about the situation. The libel alleges (Ap. 10):

> "That the dunnage and fuel oil aforesaid was furnished by order of the master and charterer of said vessel, and was charged to said vessel by libelant."

The answer is (Ap. p. 13) that claimant

> "denies that the alleged dunnage and fuel oil was furnished by order of the master and charterers or by the master of said vessel".

With the pleadings in that state the parties met and drew a stipulation of facts in which they set uncertainty at rest as follows (Ap. p. 18):

> "From time to time libelant furnished to said steamer 'Portland' fuel oil in the amounts as follows upon orders from the Master:" (there follows a list of five several furnishings).

How simple it would have been, had the parties so intended, to say that the fuel oil had been furnished upon orders of the charterer, the master merely designating (as appellants urge and as was the case in the Curacao case on which appellants rely) how much oil was needed on each occasion! Why say that the oil was furnished *upon orders from the master* with no reference to the charterer if the latter ordered and the former was a mere medium for transmission of the order as in *The Curacao* case (we quote the pertinent passages from that case below)?

And is not appellants' insistence on a distinction between orders *of* and orders *from* the master the merest play on words?

THE SOUTH COAST.

In all that has been said we fail to see how this case can be distinguished from the South Coast (supra).

All three courts (the District Court, this court, the United States Supreme Court) held that if the *Master* (one presumptively authorized by the statute) ordered the supplies there must, to defeat the lien, have been an inhibition in the charter party against a binding of

the vessel by the charterer or master. A mere provision that the charterer should pay for the fuel oil would not suffice. Such provision appeared in the South Coast charter party as in the Portland charter party.

Respecting the necessity of the inhibition, Judge Dooling said (233 Fed. 327, at 329):

> "And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, *they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor.*" (Italics ours.)

In this court Judge Wolverton said (247 Fed. 84, at 89) that:

> "* * * unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, be so subverted."

And finally, in the United States Supreme Court, Mr. Justice Holmes (251 U. S. 519) said:

> "But the authority of the owner to prohibit or to speak was misplaced, so far as the charter went, by that conferred upon the charterers, who became owners pro hac vice, and therefore, *unless the charter excluded the master's power,* the owner could not forbid its use * * * Therefore, the charterer was assumed to have power to authorize the master

> to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, *at least it can not be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.''* (Italics ours.)

The foregoing shows the fallacy of the argument on which appellants rely (Appellant's Major Brief, p. 11) that in *The South Coast* ''the charter party recognized that liens might be imposed by the charterer'' because the charter party provided that the charterer should *keep* the vessel free and clear of liens. To this the Supreme Court answers that if such clause were not a *grant* of power to create liens ''at least it can not be taken to have excluded it'' and by necessary implication a clause of exclusion is essential and was not present in *The South Coast* case nor here, though the charter parties in both cases provided that the charterers should pay for the fuel.

THE CURACAO CASE.

The Curacao case (263 Fed. 693) in which appellant takes so much comfort, is *not* authority for holding that libelant has no lien. In that case the master had nothing to do with ordering the supplies.

We quote the pertinent passages:

> ''On the arrival of the ship at Curacao a representative of the libelant came aboard, stated to the master that they had the bunkering of the ship according to contract with George S. Taylor & Co.,

and that they would supply the bunkers sufficient to take the ship to Rio, and had the master telegraph to the charterers, stating how many tons of bunkers he would take, and asking the charterers to arrange for payment of same. In reply the charterers telegraphed that they would pay for the bunkers the ship received at Curacao. Thereupon the libelant furnished the number of tons of coal the master stated he could take on board, and received from the master his draft, payable 30 days after sight, on the charterers, for the contract price, which draft was duly accepted by the charterers, but was not paid. * * *

* * * * * *

Assuming, without deciding, that that statute is applicable to the transaction in question, we are not of opinion that the furnisher acquired the lien claimed. According to the evidence it was not procured by the master, or by any one authorized to bind the vessel, therefore, but was procured by and furnished to the charterers on their order and credit. So far as appears, the master had nothing to do with getting the coal, except that, under directions from the charterers, of which the appellant was informed, he told the appellant how many tons were required. The statute does not create a presumption that a charterer, unless he is also either the 'ship's husband, master or a person to whom the management of the vessel at the port of supply is intrusted,' has authority from the owner to procure repairs, supplies, or other necessaries for the vessel. No lien on a vessel is given for supplies procured by one having no such relations to it that, under the terms of the statute, he is presumed to have authority from the owner to procure supplies."

Under such facts there could be no doubt that no one but the charterer ordered the coal, and therefore there was no presumptive lien on the vessel. In the

absence of the presumptive lien, the burden was then upon the libelant to show that in fact the charterer was authorized to bind the vessel. He could not meet this burden of proof. The vital difference between the case at bar and *The Curacao* case is that we show a presumptive lien under the statute, whereas, in *The Curacao* case the libelant could not. The difference in the resulting burden of proof is too obvious for comment.

PARAGRAPH V OF THE STIPULATION REGARDING THE CONDITIONS UNDER WHICH THE OIL WAS FURNISHED.

Repeatedly upon the oral argument and now again in its Memorandum Addition to the first brief, counsel for appellants stated and states that

> "The stipulated facts allege that the fuel oil 'was furnished at the prices and under the conditions specified in said' oil contract",

but neither in the oral argument nor here did counsel complete the sentence from which he quoted, the last phrase being "*except as modified in this section*", the section referring to paragraph V of the stipulation of facts and the modification being that there should be a lien upon the vessel (Ap. pp. 20-21).

Dated, San Francisco,
March 16, 1921.

Respectfully submitted,

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